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No. 01-1548

Supreme Court, U.S.
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In The

Supreme Court of the United States

SHELBY COUNTY SCHOOL DISTRICT;
LEON MOONEYHAN, Officially and Individually;
BRUCE SLATE, Officially and Individually,

Petitioners,

v.

DONNA COCKREL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. THERE IS A CONFLICT AMONG THE CIRCUITS

The resulting conflict among the circuits on the matter of whether teacher curricular presentations enjoy First Amendment protection under *Connick v. Myers*, 461 U.S. 138 (1983) is no mere assertion by Petitioners (*see* Response, p. 8), but is repeatedly acknowledged by the Sixth Circuit itself. Here, invoking the crucial passage that public employee speech is unprotected when the employee speaks "not as a citizen upon matters of public concern . . . ," *Connick*, 461 U.S. at 147, the Sixth Circuit states that the Fourth and Fifth Circuits have extended the holding of *Connick* beyond what this Court intended as applied to teacher curricular presentations. (App. to Pet., p. 24).[1] The Sixth Circuit holds that the Fourth and Fifth Circuits have read *Connick* too broadly stating flatly "contrary to the analyses in *Boring* and *Kirkland*, we hold that Cockrel's speech does touch on matters of public concern." (App. to Pet., pp. 25-26 (footnote omitted).) Respondent's claim that this gives rise to no conflict in terms of jurisprudence, decisional criteria, or analytical methodology (Response, p. 9), is belied by the Sixth Circuit's decision itself.

Ironically, also departing from the Sixth Circuit's analysis, Respondent seeks to factually distinguish *Boring* and *Kirkland*, arguing the "content, form, and context of

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[1] *See Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 368-69 (4th Cir.) (en banc), *cert. denied*, 525 U.S. 813 (1998); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 797-99 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990).

the speech in those cases [is] fundamentally different from the speech in this case." (Response, p. 9.) However, the Sixth Circuit noted its fundamental disagreement with both the Fourth and Fifth Circuits on its reading of *Connick* and declined to consider the form and context of Cockrel's purportedly protected expressive activities in its analysis. To the Sixth Circuit, the determinative question was not whether the teacher was seeking to impart a message or communication in his or her role as a citizen as gleaned from the form and content of the expressions, but whether the expression itself touched upon a matter of social or political importance. This is squarely at odds with *Boring* and *Kirkland*.

Boring, *Kirkland*, and the case at hand, all involve curricular presentations undertaken by teachers in the actual performance of their duties as employees rather than citizen speech in furtherance of the right to participate in public affairs. Respondent's focus on non-dispositive differences in form and context simply bears out the Sixth Circuit's fundamental error in failing to consider these factors on the record below. Indeed, Petitioners' argument on this point (that the Sixth Circuit failed to properly consider the form and context of the speech at issue as mandated by *Connick*) (*see* Petition, pp. 12-13) is not directly challenged in the Response.

Finally, in *Boring*, the teacher argued that school administrators passed on the controversial play at issue prior to its production and, accordingly, the school administration was in no position to discipline her for its use in the curriculum. *Boring*, 136 F.3d at 371 n. 3. To borrow Respondent's phrase, this was not a "constitutionally relevant" fact in that such was properly characterized as a species of due process argument which had been decided

adversely to the teacher. *Id.* Here, Cockrel's purported dutiful compliance with school administrative policies regarding guest speakers (*see* Response, p. 10), is likewise of no moment and, indeed, further underscores a proper finding that "employee" as opposed to "citizen" expressions were at issue below.

II. BALANCING OF INTERESTS UNDER *PICKERING* AND *CONNICK*

Cockrel claims to be a party injured under 42 U.S.C. § 1983. Cockrel claims to have engaged in protected speech under the First Amendment by way of her fifth grade "classroom presentations" on hemp. With respect to the balancing mandated under *Pickering v. Board of Education*, 391 U.S. 563 (1968), Cockrel successfully avoided the legal effect of the conceded "outcry within the school community" by urging her claimed compliance with applicable guest speaker policies on the Sixth Circuit. (Response, p. 12.)

The Petitioners' argument that the Sixth Circuit failed to properly apply the mandated *Pickering* balancing bears out more than a mere disagreement with the Sixth Circuit's reasoning and instead is premised on this Court's holding that the "inquiry into the protected status of speech is one of law, not fact," *Connick*, 461 U.S. at 148 n. 7. The substantial, ongoing disruption occasioned by Cockrel's classroom hemp presentations must be assessed as a matter of law. Not only did the Sixth Circuit subject Petitioners to a heightened burden, the Sixth Circuit handled the matter of the *Pickering* balancing as if it were an issue of fact when the precedents of this Court direct

otherwise. Review on this issue is clearly warranted. *See* Rule 10(c) of this Court

III. *MOUNT HEALTHY* CAUSATION

Cockrel was terminated on statutory grounds of insubordination, conduct unbecoming a teacher, and inefficiency, incompetency, and neglect of duty based on seventeen (17) instances of misconduct set forth in Superintendent Leon Mooneyhan's July 15, 1997, charging letter (App. to Pet., pp. 68-76). Significantly, Cockrel merely claims that four (4) of the seventeen (17) charges "related to Harrelson's visits to Cockrel's classroom . . . " (Response, p. 6). However, not even these charges related to the communication of the expressions deemed by the Sixth Circuit to touch upon a matter of public concern, *e.g.*, the discussion of the merits of industrial hemp before fifth graders.[2]

Under KRS 161.120(2)(a), Superintendent Mooneyhan was duty-bound to report the termination of Cockrel's contract to the Education Professional Standards Board ("EPSB") and Mooneyhan submitted the letter effecting Cockrel's termination. It is worthy of note that Cockrel's repeated argument that Mooneyhan sought the revocation of her certificate is inaccurate since, as was the case with the earlier private reprimand relating in part to the display of contraband (hemp seeds) during Harrelson's

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[2] Cockrel was charged with student confidentiality violations relating to media coverage of the visits, deceptiveness regarding the timing of Harrelson's visits, and failing to require visitors to check in on the date of one of the visits. (App. to Pet., pp. 70-75.)

first visit, Mooneyhan was fulfilling his statutory function in reporting conduct to the central state teacher certification agency. The matter of "taking action to initiate proceedings to revoke a certificate" which implicates a formal adversary hearing apparatus over which local Kentucky school district officials have no authority is vested solely in the EPSB. *See* KRS 161.120(2)(c) (App. to Pet., p. 65).

Acting on the Superintendent's report of the letter effecting the very termination she challenged below, and with Cockrel's knowing agreement and waiver of hearing rights, the EPSB (Case #97-07144) directed the surrender and suspension of her teaching certificate commencing as of a time predating the termination she challenges. (Joint Appendix, pp. 50-52.)

The termination of Cockrel's contract for cause, and the suspension and surrender of her certificate, were undisputed facts on the summary judgment record. Accordingly, Cockrel stood on a less firm footing than the non-tenured teacher who was the subject of *Mount Healthy Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977). In *Mount Healthy*, this Court emphasized the necessity of formulating "a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused," and refused to sanction a rule of causation focusing solely on whether protected conduct played a part in a challenged decision. Such a formulation "could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Mount Healthy*, 429 U.S. at 285-286.

Here, the Sixth Circuit gave Cockrel's termination for cause short shrift and completely ignored the surrender

and suspension of her teaching certificate in its *Mount Healthy* causation analysis. Cockrel argues that Petitioners' motivation to terminate her as of the commencement of the surrender of her license to teach (June 30, 1997) could not have been in issue since the EPSB did not take such action until March 11, 1999. Regardless of Respondent's argument relating to the timing of Petitioners' allegedly impermissible motivation, *Mount Healthy* counsels that "[t]he constitutional principle at stake is sufficiently vindicated if [the] employee is placed in no worse a position than if he had not engaged in the conduct." *Mount Healthy*, 429 U.S. at 285-286. Cockrel's termination, and, indeed, her inability to teach in *any* Kentucky school district cannot, as a matter of law, be said to have been caused by these Petitioners since a separate, central state agency ordered the surrender and suspension of her teaching certificate as of a date predating her termination for cause. Particularly given its complete failure to consider the action on Cockrel's certificate in its causation analysis, the Sixth Circuit has sanctioned a causation standard placing the employee in a better position as a result of the exercise of purportedly constitutionally protected expressive conduct than the employee would have occupied had she not engaged in such conduct. Even separate and apart from the Court's flawed formulation of Petitioners' burden of rebuttal (*see* Petition, p. 20), this is squarely at odds with *Mount Healthy* and compels review and correction by this Court.

CONCLUSION

For the reasons stated above and in the Petition, this Court is respectfully requested to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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